Supreme Court, U.S.
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No. 87-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF ARIZONA,

Petitioner,

—v—

STEVEN FELD, LARRY CHABLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

RICHARD J. HERTZBERG
Counsel of Record
16 Luhrs Arcade
11 West Jefferson Street
Phoenix, Arizona 85003
(602) 253-1781

Attorney for Respondent

QUESTIONS PRESENTED

1. Is an intermediate state court decision upholding a state statute and construing it according to a state prosecutor's suggestions reviewable by the United States Supreme Court at the request of that prosecutor?

2. Does an order of an intermediate state court denying a Motion to Dismiss but limiting the scope of available forms of relief at trial constitute a sufficiently "final" ruling of a state court of last resort to give this Court certiorari jurisdiction?

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

RESPONDENTS' STATEMENT OF THE CASE

The State of Arizona procured a four-count indictment of Respondents, three counts of which related to the rental of allegedly obscene materials. Count One of the indictment was for racketeering. Although Count One did not allege a predicate offense or disclose what the predicate offense for the racketeering Count was or whether in fact there was a predicate offense, the

State's position was that it must have been for obscenity.

Respondents claimed that the RICO statute, with obscenity as the predicate offense, was unconstitutional. The trial court agreed and dismissed Count One. Before trial, and before all defense motions were filed and heard, the State appealed the dismissal of Count One. The Arizona Court of Appeals reversed, upholding the statute. The Court of Appeals adopted constructions urged upon it by the Petitioner herein. The Arizona Supreme Court refused to review the case in its present posture. The case is now back in the Superior Court for trial. When proceedings in this Court are terminated, Respondents will file in the trial court, inter alia, a motion claiming that the RICO count is defective on its face under Arizona law for failure to allege a

predicate offense. See **Baines v. Superior Court In and For Pima County**, 142 Ariz. 145, 688 P.2d 1037, 1041, n.2, 1042-3 (App. 1984).

REASONS FOR DENYING THE WRIT

I. THERE IS NO CASE OR CONTROVERSY. PETITIONER LACKS STANDING BEFORE THIS COURT BECAUSE PETITIONER PREVAILED BELOW. THE ARIZONA COURT OF APPEALS UPHELD THE STATUTE AND CONSTRUED IT EXACTLY AS PETITIONER REQUESTED.

The Arizona Court of Appeals upheld the statute and construed it so that a bookstore selling religious materials, newspapers, historical novels, etc. could not be closed by divesture, dissolution, closure or otherwise because of the sale of one obscene item. That construction is "binding (on this Court) as though the precise words had been written into the ordinance". **Terminiello v. Chicago**, 337 U.S. 1, 4 (1949).

Accordingly, Arizona now has an obscenity/RICO statute which affords the

State many remedies, but not the remedy barred by **Near v. Minnesota**, 283 U.S. 697 (1931) -- the right to shut down a bookstore or a newspaper because of a single violation of an obscenity law. Assuming arguendo that a RICO/obscenity statute would be constitutional if it permitted closure because of the sale of one obscene item, Arizona simply does not have, nor is it required to have, that provision. **Leech v. American Bookseller's Association**, 582 S.W.2d 738, 745 (Tenn. 1979) (state can afford more protection to speech interests than the federal constitution mandates).

Under **Terminiello**, **supra** (requiring this Court to assume that the Arizona Court's construction was "as if the precise words had been written into" the statute), why is this matter in this Court? Is the statute in its present form somehow in conflict with the fed-

eral constitution? Arizona has the right to refuse to adopt any RICO or obscenity laws. Under **Terminiello**, **supra**, this Court must look at the statute as if the legislature wrote it as the Court of Appeals construed it. If the prosecutor does not like the statute in that form, his remedy is with the State legislature.

The Arizona Court of Appeals construed the statute according to Petitioner's (the State's) request. In the trial court, the State claimed that a proper construction of the statute's pre-judgment remedies would be that:

> "The State could move to restrain the sale of obscene items during the pendency, but the Defendants would be entitled to a hearing on each item and the State would have to prove the obscenity of each item."
>
> (Page 2 of the State's "Response to Motion to Dismiss Count One".)

The State also argued throughout that a proper interpretation of the pre-judgment remedies was that they would limit the State to an order preserving the status quo. See comments regarding the State's position in Opinion below, Appendix 58 to Petition. See also State's Response to Motion to Dismiss Count One, page 3; State's Opening Brief, page 5; and State's Supplemental Brief, page 10.

The interpretations of the pre-judgment remedies of the statute were adopted by the Arizona Court of Appeals. See pages 57-59 of Appendix to Petition.

Regarding post-judgment remedies, the State claimed that:

> ". . . §13-2314(D)(6)(c) allows only those proceeds that are traceable to the offense to be forfeited to the State."
>
> (Page 4, State's Response to Motion to Dismiss Count One.)

In its Supplemental Brief (its final brief), the prosecutor also claimed that the forfeiture of property provisions were being misinterpreted by Appellees (Respondents herein), and that:

> ". . . Arizona law would probably not 'authorize the post-judgment seizure' of 'other' films or magazines not yet determined obscene. A 'racketeering' defendant would thus be free to sell or rent his 'other' materials at the same or another location. . . ."
>
> (Page 12, State's Supplemental Brief.)

In the same brief it claimed that after judgment:

> ". . . the Arizona law does not provide for the forfeiture of materials not yet ruled obscene -- the defendant would be free to rent or sell his remaining materials at the same or another location. . . ."
>
> (Page 14, State's Supplemental Brief.)

The Arizona Court of Appeals adopted these readings of the post-judgment

remedies of the statute. See pages 62-66 of Appendix to Petition.

That court also made other rulings requested by the State, including holding that the RICO statute as applied to the predicate offense of obscenity was not vague, and that other parts of the RICO statute were constitutional.

The attempt by the State to review a decision of a state court upholding a statute by construing it in a manner suggested by the State itself is contrary to previous holdings of this Court barring certiorari when sought by the winning party. **Public Service Commission v. Brashear Freight Lines, Inc.**, 306 U.S. 204, 206 (1939). See also **Deposit Guarantee Bank v. Roper**, 445 U.S. 326, 333 (1980); **Gun v. University Committee**, 399 U.S. 383, 390, n.5 (1970); **Perez v. Ledesma**, 401 U.S. 82, 87, n.3 (1971).

The Arizona Court of Appeals, in construing the statute, did so on both federal and state constitutional grounds. However, this case presents a different situation than **Michigan v. Long**, 463 U.S. 1032 (1983). This is not just a case in which a ruling of a state court relies on both state and federal constitutional provisions and this Court must decide whether there are, in fact, independent state grounds, but rather is also a case in which a state court is asked by a state prosecutor to consider construing a state statute in a certain way, and after the court does so, the prosecutor complains to the federal court about it.

II. THE JUDGMENT OF THE ARIZONA COURT OF APPEALS IS NOT A FINAL JUDGMENT AND PROBABLY NEVER WILL BE.

Respondents have been indicted but not tried. Before all their motions were heard in the trial court, and in

fact before all their motions were even filed, the State appealed the trial court's dismissal of the RICO count. The dismissal was reversed by the Arizona Court of Appeals. The statute was upheld. The matter is now back in the trial court. The RICO count does not allege a predicate offense. Nobody knows what the Grand Jury thought the predicate offense was or even whether they thought one was required. Under Arizona law, a RICO charge must allege a predicate offense. **Baines v. Superior Court**, 142 Ariz. 145, 688 P.2d 1037, 1041, n.2, 1642-3 (App. 1984). When matters in this Court are terminated, Defendants will move to dismiss Count I in the trial court under **Baines**, **supra**. No one can predict whether Count One, the racketeering count, will ever come to trial, and if so, whether there will be a conviction under it.

Important on the finality issue is that the Arizona Supreme Court has not spoken on the issues and will have an opportunity to do so before a conviction becomes final. It simply denied review at a very early stage in the proceedings, perhaps because the case was just beginning. If the Respondents are ever tried on Count One and convicted, the Arizona Supreme Court has the power, which Respondents respectfully suggest this Court does not, to change the construction given to the statute by the Arizona Court of Appeals.

III. THE CONSTRUCTION OF THE STATUTE BY THE ARIZONA COURT OF APPEALS COMPORTS WITH THE ARIZONA CONSTITUTION AND THE UNITED STATES CONSTITUTION BECAUSE IT PREVENTS THE CLOSURE OF AN ENTIRE CHAIN OF BOOKSTORES OR VIDEO STORES BECAUSE OF THE SALE OF ONE OBSCENE ITEM.

The Arizona Court of Appeals was concerned that if one book in Respondents' store, or in a B. Dalton book-

store, or one R-rated movie in Respondents' store or in one of Maricopa County's over 500 video stores, was found to be obscene, an overzealous trial judge might interpret the RICO statute as giving him authority to close the store (or every B. Dalton bookstore in the state or even in the country). See page 62 of Appendix to Petition. The "enterprise" (corporation) would be convicted, not just one store, and it, not the store, would be subject to the statute's forfeiture, dissolution, injunction and closure remedies. See A.R.S. § 13-2301 et seq. (Appendix 4 of Petition).

This hypothetical case is not unrealistic. Arizona's statute reaches R-rated movies, i.e., simulated sex. See A.R.S. § 13-3501(6)(a) (Appendix 30-31 of Petition). It also reaches novels and magazines. See A.R.S. § 13-3501(2)

(Appendix 27 of Petition). B. Dalton bookstore sells Penthouse magazine. Penthouse magazine has previously been found to be obscene. **Penthouse International, Ltd. v. McAuliffe**, 610 F.2d 1353 [5th Cir. 1980]). R-rated movies have likewise been found obscene not only by trial courts, but state supreme courts. See **Jenkins v. Georgia**, 230 Ga. 726, 199 S.E.2d 183 (1973) (reversed 418 U.S. 153 [1974]). The Arizona Court of Appeals properly construed the statute under both state and federal law to prevent such outrages. **Near v. Minnesota**, 283 U.S. 697 (1931); **State v. Book-Cellar, Inc.**, 139 Ariz. 525, 679 P.2d 548, 555 (App. 1984).

CONCLUSION

The Court should deny the Petition, because the judgment is not final, the Arizona Supreme Court may yet speak on the issue, Petitioner was the prevailing party, the construction by the court was suggested by the Petitioner, and this Court, under **Terminiello**, **supra**, should not concern itself with constructions of state statutes by state courts.

Respectfully submitted,

RICHARD J. HERTZBERG
16 Luhrs Arcade
11 West Jefferson Street
Phoenix, Arizona 85003
Attorney for Respondents

Three copies of the foregoing Response to Petition for a Writ of Certiorari to the Arizona Court of Appeals have been mailed this 3rd day of March, 1988, to:

Benjamin W. Bull, Esq.
Counsel of Record
2845 East Camelback Road, #740
Phoenix, Arizona 85016
Attorney for Petitioner

_____

William H. Howard